JAN 25 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-918

WILLIAM S. ELLIS, JR., FLORENCE A. ELLIS, MASARU SUMIDA, STANLEY UNTEN, and CHARLEY T. SHIRAISHI,

Petitioners,

vs.

LYMAN T. HARADA, KATSUYO HARADA, and DAVID B. CASSIDY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

and

APPENDICES "A" & "B"

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioners pray that a writ of certiorari issue to review the Judgment on Appeal entered by the Supreme Court of the State of Hawaii in this case on August 26, 1974.

OPINION BELOW

The Memorandum Opinion below, rendered July 17, 1974, is unreported. Said opinion, in its entirety:

"The record of this case fails to reflect any reversible error.

"Affirmed."

JURISDICTION

The Judgment on Appeal sought to be reviewed on certiorari (Appendix "A") was entered at 8:34 o'clock A. M., August 26, 1974. Petition for Rehearing, timely filed on July 26, 1974, pursuant to Rule 5 of the Hawaii Supreme Court, was denied on August 21, 1974, prior to entry of judgment.

On November 15, 1974, the Honorable W. O. Douglas, Associate Justice of this Court, ordered an extension of time to and including January 23, 1975, for filing this petition (No. A-406).

Petitioners invoke the jurisdiction of this Court under Sec. 1257(3), 28 U.S.C.A., as it relates to rights, privileges, and immunities set up and claimed under the laws and Constitution of the United States.

QUESTIONS PRESENTED

1. Do the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution preclude the issuance of final process for the collection of money until the amount to be paid or collected by the process, if not paid, has been adjudged?

2. Where a state court lacks jurisdiction to confirm a foreclosure sale due to supervening federal jurisdiction under Chapter XII of the Bankruptcy Act, does a state appellate court have

jurisdiction to affirm a void order confirming sale?

CONSTITUTIONAL PROVISION AND AND STATUTES INVOLVED

Constitutional provision and statutes involved are set forth in Appendix "B" to this petition.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court.

Respondents HARADA are mortgagees under a mortgage against approximately 24 acres of land situate on the island of Maui, State of Hawaii. Said Respondents (hereinafter "Mortgagees") are plaintiffs in the foreclosure suit below, Civil No. 586, Second Circuit Court, State of Hawaii (hereinafter "trial court"), originally against Petitioners SUMIDA, UNTEN, SHIRAISHI, and FLORENCE A. ELLIS (hereinafter collectively "Mortgagors").

The Mortgagors purchased the subject real property for a general partnership. Petitioner WILLIAM S. ELLIS, JR., (hereinafter "W. ELLIS") succeeded Petitioner FLORENCE A. ELLIS to the partnership interest pending suit and was added as a party. The Petitioners collectively are hereinafter called the "Partners." The Partners conveyed the subject real property to W. ELLIS pending suit.

No claim is made for attorney's fees and costs in the allegations of the complaint. However, in the prayer for relief the Mortgagees demand judgment for principal, interest, costs, and attorney's fees.

Attached to the complaint is a copy of the mortgage sought to be foreclosed, which provides that,

> ". . . the Mortgagees may foreclose this mortgage, by bill in equity . . . ; and out of the proceeds of any foreclosure sale the Mortgagees may deduct all costs and expenses of foreclosure and/or suit . . ."

The mortgage provides further that,

> ". . . the terms 'advances', 'costs', and 'expenses' wherever used herein, shall include reasonable attorney's fees whenever incurred . . ."

The Mortgagors filed an answer and counterclaim and demand for jury trial. The answer alleges inequitable conduct by the Mortgagees when requested to grant partial release of mortgage, as follows:

> "That Plaintiffs refused to comply with reasonable promptness to the request of said Defendants for partial release in accordance with the express covenant contained on page 6 of Exhibit B (mortgage), causing substantial damage to said Defendants, as alleged in the Counterclaim annexed hereto . . ."

The counterclaim seeks $50,000 pecuniary damages for breach of contract. The Mortgagees responded with a general denial.

Upon motions by the Mortgagees, the demand for jury trial was stricken and summary judgment was granted on the complaint only. In granting summary judgment, the trial court entered a certification of finality sua sponte, pursuant to Rule 54(b), H.R.C.P.

On March 24, 1966, the trial court entered a Judgment, Decree of Foreclosure, and Order of Sale, which directs the clerk to enter a final money judgment. Following recitals of foreclosure, the trial court named two commissioners and specified procedures for their qualification and conduct of a sale. The trial court further ordered,

> " . . . that the amounts of further interest, costs, attorneys' fees, and all other expenses, charges and claims of plaintiffs . . . shall be fixed and determined by this Court upon confirmation of the sale of said property."

Also on March 24, 1966, the clerk of the trial court entered a final money judgment on the note, as directed:

> "JUDGMENT
>
> "Pursuant to the Judgment, Decree Of Foreclosure, And Order Of Sale entered herein;
>
> "JUDGMENT is entered in favor of plaintiffs . . . and against defendants . . . in the amount of $52,066 (principal of $44,000; interest of $8,066, computed at

5 1/2% per year from November 20, 1962, to and including March 18, 1966)."

The clerk's money judgment on the note was recorded by the Mortgagees in the Bureau of Conveyances of the State of Hawaii on March 29, 1966, to create a lien on all real property of the Mortgagors held in any capacity.

The Rule 54(b), H.R.C.P., certification of finality forced immediate piecemeal appeal from the judgment on the foreclosure complaint pending disposition of the counterclaim for a $50,000 offset. The Mortgagors timely noticed appeals to the Supreme Court of the State of Hawaii, hereinafter called the "appellate court."

The finalized money judgment on the complaint for $52,066 principal and interest (making no provision for attorney's fees) was affirmed on May 29, 1968, in an unreported memorandum opinion.

In the meantime, the Mortgagees moved for summary judgment on the severed counterclaim, which motion was granted by an order entered September 28, 1966. The Mortgagors timely appealed the final judgment on the counterclaim and related orders.

On September 26, 1968, the appellate court reversed the trial court as to the judgment on the counterclaim and held that the Partners are entitled to a jury trial. Harada v. Burns, 50 Haw. 528.

The commissioners were not notified of their March 24, 1966, appointment until "some-

time in the latter part of 1971." Upon informal notice to W. ELLIS by counsel for the Mortgagees that foreclosure sale was imminent, the Partners moved the trial court on January 8, 1972, to vacate the order of sale for the reason that:

> "The general law of foreclosure, recognized in this jurisdiction, is that a sale cannot be ordered without consent of the mortgagor unless the amount to be paid to avert the sale, including attorney's fees, has been fully determined."

The motion was denied, whereupon the Partners moved for rehearing, or in the alternative for a declaratory order. The alternative motion requests a declaratory order defining the words "attorney's fees" contained in the March 24, 1966, order of sale,

> " . . . for the reason that a justiciable controversy exists between plaintiffs and defendants, to-wit:
>
> "1. Plaintiffs appear to contend that they are presently entitled to unliquidated attorney's fees for the case in chief, on the basis of the Judgment and Decree of Foreclosure which is integral with Order of Sale reserving such determination until after foreclosure sale.
>
> "2. On the other hand, defendants contend . . . that the words 'attorneys fees' contained in the Order of Sale refer only to those fees incident to execution of judgment by foreclosure; and that any other construction renders the judgment on the complaint

either interlocutory and unenforceable or unconstitutional and void for uncertainty." (Emphasis added.)

The motions were denied by order entered April 4, 1972, which was timely appealed. Upon motion of the Mortgagees, the appeal was dismissed on September 18, 1972.

Thereafter, the commissioners published notice of foreclosure sale for noon on November 30, 1972. On November 17, 1972, W. ELLIS noticed a motion to set and to stay, joined in by the Mortgagors, for November 27, 1972:

"1. To set for jury trial on a day certain, following remand of the record, the following pending matters:

. . .

"b. Entitlement of Plaintiffs to attorney's fee.

. . .

"d. Counterclaim of Defendants ELLIS, SHIRAISHI, UNTEN, and SUMIDA, against Plaintiffs.

"2. Pursuant to Rule 62(h), H.R.C.P., to stay enforcement of partial judgment on the Complaint until entry of final judgment on all claims.

"The reason for said motion is that mortgagor Defendants wish to determine the net indebtedness for purposes of averting a foreclosure sale, in accordance with the

requirements of due process of law and equal protection of the laws guaranteed by the 14th Amendment to the U.S. Constitution." (Emphasis added.)

The trial court indicated it would not stay the foreclosure proceedings pending trial of unsettled matters, whereupon W. ELLIS attempted to have those matters set for jury trial on a day certain commencing the first full week in January, 1973.

The trial court decided only to place the matters on the ready trial calendar, without priority, and declined to determine whether or not the matter of attorney's fees would be subject to trial by jury.

One commissioner conducted the auction, as scheduled, in the absence of the other. An agent for Respondent DAVID B. CASSIDY made the final bid of $139,000. Hereinafter, Respondent CASSIDY is called the "High Bidder."

The order of sale from which the Commissioners derive their authority provides that,

> ". . . within twenty (20) days after conducting such sale, such Commissioners shall return to this Court and report the proceedings had thereon for confirmation by this Court . . ."

On Friday, December 22, 1972, twenty-two days after the public auction, the Mortgagees filed and served by mail a Motion to Approve Commissioners' Report, Confirm Sale and Authorize Disbursement of Parcels of Sale.

In addition to seeking approval of the unverified commissioners' report attached, the Mortgagees also moved,

> ". . . that the fees and expenses of the Commissioners be approved and allowed; that the attorneys for plaintiffs be allowed reasonable attorney's fees equal to twenty-five percent (25%) of the amount of the judgment and accrued interest . . ."

The Mortgagees give no supporting details whatsoever regarding attorney's fees; no affidavit of counsel is attached; and no request is made for costs.

The report shows a receipt for a binder of $14,000 paid by the agent for the High Bidder.

Hearing on confirmation of sale was noticed for Friday, December 29, 1972, a half-holiday preceding the New Years weekend. Intervening Christmas fell on a Monday.

At 9:03 o'clock A.M., December 26, 1972, W. ELLIS filed Notice of Motion for Continuance and to Advance Trial with supporting affidavit. The latter was noticed for 11:00 o'clock A.M. that date and seeks waiver of 48 hours' notice. The substance of the motion follows:

> "2. For continuance of hearing on confirmation of sale until pending. . . matters placed on the ready trial calendar on November 27, 1972, have been determined. . . .
>
> "3. Pursuant to Sec. 635-3, H.R.S., to advance on the ready trial calendar for

jury trial on a date certain those pending matters placed on said calendar on November 27, 1972, . . ."

Counsel for the Mortgagees and for the High Bidder opposed the motion. Continuance of hearing on confirmation of sale was denied.

December 28, 1972, was a day of mourning for ex-President Truman.

On December 29, 1972, prior to commencement of hearing the Mortgagees' motion to the trial court to confirm the auction sale, W. ELLIS filed a proceeding for a real property arrangement under Chapter XII of the Bankruptcy Act in the U.S. District Court for the District of Hawaii. He has remained debtor-in-possession.

At 9:00 o'clock A.M., December 29, 1972, the following Notice of Pending Proceeding Under Chapter XII of the Bankruptcy Act was filed in the trial court for W. ELLIS:

"To: The Hon. S. GEORGE FUKUOKA
and Counsel of Record

"PLEASE TAKE NOTICE that the undersigned, as legal owner of the premises subject to foreclosure sale in this action . . . , at 8:44 o'clock A.M., this date, filed a petition in the United States District Court for the District of Hawaii in Honolulu, Hawaii, under Chapter XII of the Bankruptcy Act for a real property arrangement. Said proceeding includes the said property subject to foreclosure sale in this action and other real property owned by the undersigned.

"The legal effect of said Chapter XII petition is to give the bankruptcy court paramount and exclusive jurisdiction of the real property subject thereto and to stay all acts and proceedings to enforce liens against such property."

The notice was acknowledged on the record by the trial court. Proceedings nevertheless commenced at 9:15 o'clock A. M., December 29, 1972 (absent the Partners), to confirm the auction sale.

The trial court announced its decision to award exactly 25% of the judgment principal and interest as attorneys fees for the Mortgagees' counsel ($18,312.26), based upon conjecture, and miscellaneous "out-of-pocket" costs ($838.32). It also announced its decision to award its commissioners 6% of the bid price ($8,340.00), plus costs and expenses ($1,159.02). The High Bidder requested until January 10, 1973, to pay the $125,000 balance of the purchase price.

At 1:24 o'clock P. M., December 29, 1972, W. ELLIS filed in the trial court a Certified Copy of Chapter XII Petition No. BK-72-391. Subsequently, he filed a certified copy of an amended petition, and notice of lis pendens filed in No. BK-72-391.

Order Confirming Sale of Property was entered January 10, 1973, in the trial court, directing the High Bidder to pay the balance of the bid price on said date, and also directing the commissioners to tender a deed to the High Bidder on said date upon receipt of such payment.

Rather than execute the order as directed, the High Bidder and the commissioners entered into an extra-judicial "escrow" arrangement. The order has not been executed.

On February 2, 1973, the Partners timely noticed appeal from the Order Confirming Sale of Property.

B. Proceedings in the Appellate Court.

1. First Question Sought to Be Reviewed on Certiorari. One of the points relied upon by the Partners in their opening brief to the appellate court is the following:

> "1. The trial court exceeded its jurisdiction, in denial of due process of law guaranteed by the 14th Amendment to the U.S. Constitution in its award of attorney's fees and costs to the Mortgagees. . . . "

Argument in support of the point is captioned as follows:

> "1. Due Process of Law, Guaranteed by the 14th Amendment to the U.S. Constitution, Requires That Courts Not Transcend Their Authority Conferred by Law and That Procedural Rules Deliberately Made and Promulgated by This Court Not Give Way to Delusive Interests of Haste.
>
> "2. The Trial Court Transcended Its Equity Jurisdiction in Entering a Personal Money Judgment at Law on a Complaint in Equity for Foreclosure, Denying

Due Process of Law; Therefore, the Judgment Sought to Be Enforced Is Void, and/or Enforcement by Foreclosure Is Void.

"3. The Trial Court Transcended Its Equity Jurisdiction and Thereby Denied Due Process of Law in Awarding Attorney's Fees and Costs to the Mortgagees on January 10, 1972, Except Possibly for Any Services Incidental to the Enforcement of Judgment.

"4. If the Trial Court Had Post-Judgment Jurisdiction to Determine the Attorney's Fees Component of the Judgment Debt, It Nevertheless Transcended Its Discretionary and Statutory Authority and Denied Due Process of Law in Its Award of Attorney's Fees and Costs."

In support of the first contention in the argument, the Partners rely upon the 14th Amendment to the U.S. Constitution and the following decisions of this Court: Windsor v. McVeigh, 93 U.S. 274, 282; Smith v. United States, 360 U.S. 1, 10; and Duke Power Co. v. Greenwood Co., 299 U.S. 259, 268.

In support of the second contention, the Partners again rely upon the 14th Amendment and Windsor v. McVeigh.

The Hawaii case most directly in point to the first question sought to be reviewed on certiorari is MDG Supply v. Diversified Investments, Inc., 51 Haw. 375, 380, and 51 Haw. 479. This case is relied upon in support of the Partners'

third contention in the argument. At 380, the appellate court states:

> ". . . A judgment of foreclosure of mortgage or other lien is final, although it contains a direction to commissioners to make a report of sale and bring the proceeds into court for an order regarding their disposition. . . . This is on the ground that the judgment finally determines the controversy and subsequent proceedings are simply incidents to its enforcement. Ray v. Law, 7 U.S. (3 Cranch) 178 (1805); Whiting v. United States Bank, 38 U.S. (13 Peters) 5 (1839)." (Emphasis added.)

Petitioner W. ELLIS herein was manager of Diversified Investments, Inc. Counsel for MDG Supply, Inc., during the trial phase was Thomas S. Ogata, Esq., now an associate justice of the appellate court. Said justice initially recused himself from the appeal in the case at bar and then withdrew his certificate of recusal.

In support of the third contention, the Partners also rely upon the 14th Amendment to the U.S. Constitution, Grant v. Phoenix Mut. Life Ins. Co., 106 U.S. 429, 431; Railroad Company v. Swasey, 23 Wall. 405, 409-410; and Windsor v. McVeigh, supra.

In support of the fourth contention, the Partners again rely upon the 14th Amendment to the U.S. Constitution and Windsor v. McVeigh.

As indicated supra, the appellate court decided the first question presented for review by its conclusion that the record before it in this

case fails to reflect any reversible error.

2. Second Question Sought to Be Reviewed on Certiorari. The Partners argued the second question sought to be reviewed by this Court in their reply brief to the appellate court under the following captions:

"1. Partners Did Not Appear in Trial Court on December 29, 1972, for Lack of Procedural Due Process.

"2. Partners Did Not Appear in Trial Court on December 29, 1972, Because of Chapter XII Proceeding.

"3. Partners Did Not Appear in Trial Court on December 29, 1972, Because Allowances for Prior Services and Expenses Must be Made De Novo by Bankruptcy Court, in Any Event."

In support of argument on the first contention, the Partners attached and cited pertinent record papers which rely upon the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

In support of the second contention, the Partners rely upon In re Potts, 142 F.2d 833, 838 (applying Sec. 828, 11 U.S.C.A.); Meyer v. Rowen, 181 F.2d 715, 716 (citing Secs. 811, 814, and 828, 11 U.S.C.A.); Taylor v. Sternberg, 293 U.S. 470, 472-473 (attorney's fees and receiver's fees); and Kalb v. Feuerstein, 308 U.S. 433, 440-441 (confirmation of sale).

In arguing the third contention, the Partners rely upon Sec. 908, 11 U.S.C.A., 6A Collier on

Bankruptcy, 14th ed., sec. 14.03, p. 1103, sec. 14.04, pp. 1116-1118; and Sec. 11a(21), 11 U.S.C.A.

The memorandum opinion of the appellate court also decided these contentions by the conclusion that the record before it fails to reflect any reversible error.

The Partners timely petitioned the appellate court for rehearing on the following grounds:

> "1. The trial court lacked jurisdiction over sale confirmation proceedings from 8:44 o'clock A.M., December 29, 1972, because of the pendency of Chapter XII proceeding No. BK-72-391, U.S. District Court for the District of Hawaii. All sale confirmation proceedings by the trial court were automatically stayed by operation of federal law.
>
> "2. Therefore, the order appealed is void and of absolutely no effect under federal law, whether or not erroneous under state law.
>
> "3. Because of the trial court's lack of jurisdiction under federal law, this Court lacks jurisdiction except for the purpose of reversing and vacating the appealed order to clarify the record."

The foregoing contentions were decided per curiam by the appellate court as follows:

> "The petition for rehearing is denied without argument."

REASONS FOR GRANTING THE WRIT

A. The Courts Below Decided the First Question Sought to Be Reviewed Contrary to the Applicable Decisions of This Court.

Ray v. Law, and Whiting v. United States Bank, supra, are cited by the appellate court in MDG Supply v. Diversified Investments, Inc., supra, in holding that "the judgment finally determines the controversy, and subsequent proceedings are simply incidents to its enforcement."

Said authorities are also cited by this Court in the following later cases:

> "It has also been many times decided that a decree of sale in a foreclosure suit, which settles all of the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree . . . [T]o justify such a sale, without consent, the amount of the debt must be determined. . . . Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. . . . " Grant v. Phoenix Mut. Life Ins. Co., 106 U.S. 429, 431 (emphasis added).

> "An appeal may be taken from a decree of foreclosure and sale when the rights of parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled. The sale in such a case

is execution of the decree. By means of it the rights of the parties, as settled, are enforced.

"But to justify such a sale, without consent, the amount due upon the debt must be determined . . . Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. . . . Such adjudications require action of the court. . . . " Railroad Company v. Swasey, 23 Wall. 405, 409-410 (emphasis added).

The foregoing quotations appear on pages 56-57 of the Partners' opening brief to the appellate court. In concluding that the record in the case reflects no reversible error, said court decided the first question sought to be reviewed contrary to the quoted decisions of this Court.

The appellate court also decided the question contrary to its own decision in MDG Supply, supra. Thus, while the applicable decisions of this Court were employed to hold against the interests of W. ELLIS in MDG Supply, now that MDG Supply directly supports the position of W. ELLIS and associates, the appellate court looks the other way. It is respectfully submitted that, for this reason, the decision below violates the equal protection clause of the 14th Amendment to the U.S. Constitution.

The first question was also decided contrary to Windsor v. McVeigh, Smith v. United States, and Duke Power Co. v. Greenwood Co., supra.

B. The Appellate Court Decided the Second Question Sought to Be Reviewed Contrary to Federal Statutes and Applicable Decisions of This Court.

Proceedings on confirmation of foreclosure sale were automatically stayed by operation of Chapter XII of the Bankruptcy Act on December 29, 1972, as noted in In re Potts, supra (applying Sec. 828, 11 U.S.C.A.), and Meyer v. Rowen, supra (applying Secs. 811, 814, and 828, 11 U.S.C.A.).

Although it appears to the Partners that this Court has not decided a Chapter XII case, Kalb v. Feuerstein, supra, involves a similar automatic stay under subsection "o" of Sec. 75 of the Bankruptcy Act.

> "The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because the state court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of sale, the execution of the sheriff's deed . . .--to the extent based upon the court's actions--were all without authority of law. . . . " (Emphasis added.)

Inasmuch as the bankruptcy proceedings in Kalb v. Feuerstein concern confirmation of sale by a state court after an automatic stay due to supervening bankruptcy jurisdiction, it is re-

spectfully submitted that said decision is applicable to the case at bar. The trial court, in proceeding with confirmation of sale, and the appellate court, in concluding that the record in the case reflected no reversible error, tacitly decided the jurisdictional question contrary to Kalb v. Feuerstein.

To the extent that the confirmation of sale proceedings in the state court relate to commissioners' and attorneys' fees, Taylor v. Sternberg, 293 U.S. 470, 472-473, is directly in point.

> "Upon adjudication in bankruptcy, all the property of the bankrupt vests in the trustee as of the date of filing the petition. Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter the court's possession and control cannot be affected by proceedings in other courts, whether state or federal. . . .
>
> ". . . In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached. This result was binding upon the state court and equally binding upon the receiver as custodian for that court. Before the petition in bankruptcy was filed, the receiver's compensation as well as that of his counsel were matters wholly within the control of the state court. . . . But with the filing of the petition in bankruptcy, the power of the state court in that respect ceased; and the order fixing the compensation of the receiver and his

counsel was a nullity because made without jurisdiction, such jurisdiction then having passed to the bankruptcy court. . . . " (Emphasis added.)

Although the Taylor case does not involve a Chapter XII proceeding, it is respectfully submitted that the jurisdictional point is directly applicable to the case at bar. The trial court, in determining commissioners' and attorneys' fees, and the appellate court, in concluding that the record in the case reflects no reversible error, implicitly decided the jurisdictional question contrary to Taylor.

By affirming an order which was void ab initio, the appellate court determined jurisdiction in such respect contrary to Windsor v. McVeigh, supra.

C. Federal Questions Involved Are So Substantial as to Require Review by This Court.

Millions of Americans are mortgagors. Considering national recession, inflation, and unemployment, many will have difficulty meeting their mortgage payments.

In the event that foreclosure suits should be necessary, it is imperative that the principles set forth by this Court in the Grant and Railroad cases be strictly applied to such proceedings.

It is respectfully submitted that rights so recognized by this Court should be expressly determined to be constitutionally guaranteed to all Americans, whether in state or federal proceedings.

In the event that distressed mortgagors should seek relief under the Bankruptcy Act, exclusive and paramount federal jurisdiction should be respected by the judges and justices of state courts who have sworn to uphold the Constitution of the United States.

Only this Court, by enforcing the Congressional intent of the Bankruptcy Act, can effectively prevent a debilitating proliferation of concurrent proceedings which only add to debt or oppression.

CONCLUSION

For the foregoing reasons, the Partners urge the Court to grant a writ of certiorari to review the judgment of the Supreme Court of the State of Hawaii in this case.

DATED at Honolulu, Hawaii, January 20, 1975.

Respectfully submitted:

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Appendix "A"

NOS. 5474 and 5519

IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1973

LYMAN T. HARADA, et ux.,	) CIVIL NO. 586
Plaintiffs-Appellees,	) SECOND CIRCUIT
and	) COURT
DAVID B. CASSIDY,	) APPEALS
Purchaser-Appellee and Appellant,	) FROM ORDERS ENTERED JANUARY 10,
vs.	) 1973 AND JUNE 19, 1973
RALPH W. KONDO,	)
Defendant-Appellee,	) HON. S. GEORGE FUKUOKA,
and	) Judge
FLORENCE A. ELLIS, et al.,	)
Defendants-Appellants and Appellees.	)

JUDGMENT ON APPEAL

Pursuant to a Memorandum Opinion of the Supreme Court of the State of Hawaii filed on

July 17, 1974, the Order Confirming Sale entered by the Court of the Second Judicial Circuit on January 10, 1973, is hereby affirmed.

DATED: Honolulu, Hawaii, Aug. 26, 1974.

BY THE COURT:

/s/ Clement J. H. Chun
Clerk

APPROVED:

/s/ William A. Richardson
Chief Justice

Appendix "B"

CONSTITUTIONAL PROVISION AND AND STATUTES INVOLVED

1. 14th Amendment, U.S. Constitution

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, and property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A., Const. Amend. 14, Sec. 1.

2. Federal Statutes

a. Sec. 811, 11 U.S.C.A.:

"811. Exclusive jurisdiction of debtor and his property.--Where not inconsistent with the provisions of this chapter [§ 801 et seq. of this title], the court in which the petition is filed shall, for the purposes of this chapter [§ 801 et seq. of this title], have exclusive jurisdiction of debtor and his property, wherever located."

b. Sec. 828, 11 U.S.C.A.:

"828. Petition as stay of proceedings to enforce lien.--Unless and until otherwise ordered by the court, upon hearing and after notice to the debtor and all other parties in interest, the filing of a petition under this chapter [§ 801 et seq. of this title] shall operate as a stay of any act or proceeding to enforce any lien upon the real property or chattel real of a debtor."

c. Sec. 907, 11 U.S.C.A.:

"907. Stay of prior proceeding--Possession of property of debtor.--Such prior proceeding shall be stayed by the filing of a petition under this chapter [§ 801 et seq. of this title]. The trustee appointed under this chapter [§ 801 et seq. of this title], upon his qualification, or if a debtor is continued in possession, the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee of debtor in possession shall also have the right to immediate possession of all real property and chattels real of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage."

d. Sec. 908, 11 U.S.C.A.:

"908. Protection of incurred obligations.--The judge shall make such provision as may be equitable for the protection of the obligations incurred by a receiver or trustee in such prior proceeding and for the payment of the reasonable compensation for services rendered and of the proper costs and expenses incurred therein as may be allowed by the judge."

SUPREME COURT, U. S.

FILED
JAN 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-918

WILLIAM S. ELLIS, JR., FLORENCE A. ELLIS, MASARU SUMIDA, STANLEY UNTEN, and CHARLEY T. SHIRAISHI,

Petitioners,

vs.

LYMAN T. HARADA, KATSUYO HARADA, and DAVID B. CASSIDY,

Respondents.

ADDENDUM TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

and

APPENDICES "C" & "D"

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IN THE

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WILLIAM S. ELLIS, JR., FLORENCE A. ELLIS, MASARU SUMIDA, STANLEY UNTEN, and CHARLEY T. SHIRAISHI,

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vs.

LYMAN T. HARADA, KATSUYO HARADA, and DAVID B. CASSIDY,

Respondents.

ADDENDUM TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioners hereby supplement those sections captioned "Opinion Below" and "Jurisdiction" contained in Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii dated January 20, 1975, by attaching hereto as Appendix "C" the Memorandum Opinion entered by the Hawaii Supreme Court on July 17, 1974, and by attaching hereto as Appendix "D" the Decision of the Court entered by said Court on August 21, 1974, denying Petition for Rehearing.

DATED at Honolulu, Hawaii, January 28, 1975.

Respectfully submitted,

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Appendix "C"

NOS. 5474 & 5519

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1973

LYMAN T. HARADA, et ux., Plaintiff-Appellees, and DAVID B. CASSIDY, Purchaser-Appellee and Appellant, vs. RALPH W. KONDO, Defendant-Appellee, and FLORENCE A. ELLIS, et al., Defendant-Appellants and Appellees.	CIVIL NO. 586; SECOND CIRCUIT COURT; HON. S. GEORGE FUKUOKA, JUDGE PRESIDING; APPEALS FROM ORDERS ENTERED JANUARY 10, 1973, AND JUNE 19, 1973

MEMORANDUM OPINION

The record of this case fails to reflect any

reversible error.

Affirmed.

Helen B. Ryan for defendant-appellants and appellees except William S. Ellis, Jr.

/s/ William S. Richardson

/s/ Bernard H. Levinson

/s/ Thomas S. Ogata

William S. Ellis, Jr., defendant-appellant and appellee, pro se

/s/ Benjamin Menor

/s/ John C. Lanham

Edward F. Mason (Crockett & Crockett of counsel) for plaintiffs-appellees

Appendix "D"

NOS. 5474 & 5519

IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1973

LYMAN T. HARADA, et ux., Plaintiff-Appellees, and DAVID B. CASSIDY, Purchaser-Appellee and Appellant, vs. RALPH W. KONDO, Defendant-Appellee, and FLORENCE A. ELLIS, et al., Defendant-Appellants and Appellees.	PETITION FOR REHEARING

Decision of the Court

Per Curiam. The petition for rehearing is

denied without argument.

Helen B. Ryan for defendants-appellants except W. Ellis	/s/ William S. Richardson /s/ Bernard H. Levinson
William S. Ellis, Jr., defendant-appellant, pro se	/s/ Thomas S. Ogata /s/ Benjamin Menor /s/ John C. Lanham